in the irregular assessment cases, whereas the first element is really the controlling principle as discussed above. Whether the distinction between voluntary and involuntary payments be one purely of fact, see *Mathews* v. *Kansas* (1883) 80 Mo. 231, or whether it take the form of rules of law, as where the question of duress is dependent upon whether a cloud upon title is created, see *Montgomery* v. *Cowlitz Co., supra,* doubtful cases will arise. The logical method would then be to apply the fourth consideration to deny a recovery and not hold that the payment was "deemed" to be voluntary. In these borderline cases, the question of other available remedies finds its place. By a proper application of the preceding principles, the third consideration, that of mistake of law or fact, so difficult to apply, may often be avoided. Like the second consideration, it is greatly overworked in the cases, see *Richardson* v. *City of Denver* (1892) 17 Colo. 398, and like it, is often employed when the first consideration is controlling, notably in the irregular assessment cases. A recent case in Kansas presented an interesting example of the manner in which these different considerations conflict. A taxpayer fraudulently neglected to declare her property. Thereupon she was assessed, but not within the time limit set by the statute in such cases. The power of the State to tax under that act was therefore gone. To prevent seizure and sale of her property under such illegal assessment, she paid the tax. The court permitted a recovery. *Commissioners* v. *Lane* (1907) 90 Pac. 1092. The tax act being constitutional, but the assessment illegal and not merely irregular, the good conscience of the situation is at least arguable. But assuming good conscience to be doubtful, there is the element of involuntary payment demanding a recovery and the rule of policy forbidding it. It would seem that the latter should prevail and the decision erroneous unless it can be said that good conscience is entirely with the plaintiff, which result does not seem justifiable in view of the facts.

THE NATURE OF QUASI-JUDICIAL FUNCTIONS AND THE CONSTITUTIONALITY OF THE NEW YORK RECOUNT ACT.—The application of the constitutional principle prohibiting one department of government from encroaching on the domain of another, has given rise to the necessity of determining what acts the judicial department can properly perform. It is well settled that the courts may act ministerially if the action is incidental to their judicial functions, as for example, in designating a law journal, *Daily Register Printing Co.* v. *The Mayor* (N. Y. 1869) 52 Hun 542, or, in ordering repairs for court house. *Commissioners of White County* v. *Gwin* (1893) 136 Ind. 562. In some States the courts may perform purely ministerial functions unconnected with their judicial business if the acts performed have not been specially assigned by the Constitution to the executive department. *Ross* v. *Freeholders of Essex* (1903) 69 N. J. L. 291; *Board* v. *Moore* (1903) 161 Ind. 426; *People ex rel.* v. *Morgan* (1878) 90 Ill. 558. But the theory of these cases seems to violate the constitutional principle of separating the work of the three governmental departments according to the nature of the acts performed, so that he who executes the law shall not also make or administer it. See Federalist No. 47. And it seems that most jurisdictions, including New York, *Striker* v. *Kelly* (N. Y. 1844) 7

Hill 9, are forced to distinguish between the nature of judicial and executive functions. The Federal courts have from the earliest times insisted not only that the judicial act must be a settlement of a controversy after a hearing, but that the settlement must be final, and not subject to review by an executive officer. *Hayburn's Case* (U. S. 1792) 2 Dall. 409, note; *U. S.* v. *Ferreira* (U. S. 1851) 13 How. 40; *Gordon* v. *United States* (1864) 117 U. S. 697. Drawing a definition of judicial function from these cases, we may say that it is the exercise of power to hear and finally determine a controversy according to law. But the act of a ministerial or executive officer may be a judicial determination under this definition. Thus it is held that the erroneous decision of a tax assessor cannot be made the basis of an action against him because of its judicial nature. *Weaver* v. *Devendorf* (1846) 3 Denio 117. But the duty imposed on such an officer is not purely judicial, because it contains the further element of execution, the judicial act being preparatory, or incidental to his ministerial duty. Proceedings before the Court of Claims, when its decision was subject to review by the Secretary of Interior, illustrate the nature of an executive-judicial function although the court itself did not perform any ministerial act. But because its authority was subordinate to that of an executive officer, its decision, the review by the Secretary and his action thereon, should be considered as one proceeding containing both the elements of judicial and executive action. It is submitted that this is the final analysis of the holdings, in *Gordon* v. *United States, supra,* and *In Re Sanborn* (1893) 148 U. S. 222, that the Court of Claims did not act in a judicial capacity. See also *United States* v. *Ferreira, supra.* This intermediate class of duties is recognized as quasi-judicial. Throop, Public Officers, 533. The State legislatures have imposed upon the courts many duties of this character and the statutes have been held constitutional, where the judicial has been the important element in the proceeding. For example, the court acts judicially in determining the value of property taken for a highway, and the benefit of the new highway to abutting owners, and in making the amount determined a lien on the property, *Striker* v. *Kelly, supra,* or, in determining the liability of towns to erect bridges, and to order the mode of its performance, *Matter of Mt. Morris and Castille* (1886) 41 Hun 29, (these cases seem to be on the border line dividing judicial from quasi-judicial, as the ministerial element involved is small), or, after a hearing, in determining the necessity for a highway and appointing commissioners, *Citizens' Sav. Bank* v. *Greenburgh* (1903) 173 N. Y. 215, where the ministerial element seems more definite, but still is not controlling. On the other hand where the ministerial or executive element becomes the more important, as in the appointing of a city board of control, a statute imposing this duty on a court was held unconstitutional. *State ex rel.* v. *Brill* (Minn. 1907) 111 N. W. 639. In the last case there was an element of discretionary power which might be termed judicial in the sense that it called for an exercise of judgment. But obviously there can be no executive or ministerial act without some psychical or judgment-forming process. The cases above illustrate to what degree the judicial element must attain, before the action becomes a proper one for the courts. They must be carefully distinguished from those cases in which it was held that the duties were imposed upon

the judges personally as commissioners and not upon them as a court. See *U. S.* v. *Ferreira, supra.*

The recent Recount Act in New York provided that on petition of a candidate for election, the Supreme Court should appoint commissioners to count the ballots, attorneys representing the candidates being present; that any ballot then disputed should be passed upon by a Supreme Court Justice, with a final review by the Appellate Division, and that the result of this count should determine to whom the Supervisor of Elections should issue an election certificate. The Second Department of the Appellate Division held the statute constitutional whereas the First Department considered it unconstitutional. *People ex rel. Metz* v. *Maddox* (1907) 105 N. Y. Supp. 702; *People ex rel. Metz* v. *Dayton* (1907) 105 N. Y. Supp. 809. From the standpoint of the imposition of ministerial duties upon the court, the point most considered by the courts and counsel, the former view seems the correct one. Admitting that the act of counting the ballots is ministerial, there is a clear judicial element in determining how they shall be counted, and these particular judicial determinations taken in connection with the ministerial part of the procedure seem to bring the case within the sphere of quasi-judicial functions properly exercisable by the courts under the authorities cited above. The Court of Appeals held the Act unconstitutional as being either a recanvass by a body not bi-partisan as required by Art. 2, Sec. 6, Cons., or a judicial proceeding without trial by jury. (Nov. 19th, 1907.)

CRIMES PUNISHABLE IN DIFFERENT JURISDICTIONS.—Crimes punishable in different jurisdictions may be grouped into three classes: first, offenses committed upon a vessel or car passing through A and B; second, offenses committed partly in A and partly in B; third, offenses committed wholly in A, but which under particular circumstances, and by a fiction of law are held to "continue" into B. Statutes in a few States provide that crimes of the first class may be punished in any jurisdiction through which or into which the vessel or car has passed on that trip, if their locality cannot be determined. *State* v. *Timmens* (1860) 4 Minn. 325; cf. *Watt* v. *People* (1888) 126 Ill. 9. Though held constitutional, they can be supported only from practical necessity and not on principal. *State* v. *Anderson* (1905) 191 Mo. 134. Crimes of the second class were not punishable at common law. Thus if a man were wounded in one county, and died in another, the offender was indictable in neither. 4 Bl. Comm. 304; 2 Hawk. P. C., c. 25 § 36; 1 Chitty, Crim. Law 177. The statute of 2 & 3 Ed. VI remedied this by providing for an indictment in either county, and similar statutes exist generally in this country and have been held constitutional. *Commonwealth* v. *Jones* (1904) 118 Ky. 889; *Commonwealth* v. *Parker* (1824) 2 Pick. 550, 558; *Coleman* v. *State* (1903) 83 Miss. 290; *State* v. *Blunt* (1892) 110 Mo. 323; *State* v. *Pauley* (1860) 12 Wis. 599. They comprehend not only homicide, but also the pollution in A and the nuisance resulting in B, *State* v. *Refining Co.* (1902) 117 Ia. 524; *State* v. *Herring* (1898) 21 Ind. App. 157, the forgery of a signature to an instrument in A and of the filling in of the blanks in B, *State* v. *Spayde* (1899) 110 Ia. 726, the making of false representations in A and the obtaining of money in B, *People* v. *Dimmick* (1887) 107 N. Y. 13; *People* v. *Peckens* (1897) 153 N. Y. 576, a promise of mar-